

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Time Warner Cable Inc.
Petition for Determination of Effective
Competition in Three Communities in
Massachusetts
MB Docket No. 13-92, CSR 8778-E

MEMORANDUM OPINION AND ORDER

Adopted: February 5, 2015

Released: February 5, 2015

By the Senior Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION AND BACKGROUND

1. Time Warner Cable Inc., hereinafter referred to as "Time Warner" or "Petitioner," has filed with the Commission a petition pursuant to Sections 76.7, 76.905(b)(2) and 76.907 of the Commission's rules for a determination that Petitioner is subject to effective competition in the communities listed on Attachment A and hereinafter referred to as the "Communities." Petitioner alleges that its cable system serving the Communities is subject to effective competition pursuant to Section 623(l)(1)(B) of the Communications Act of 1934, as amended ("Communications Act"), and the Commission's implementing rules, and is therefore exempt from cable rate regulation in the Communities because of the competing service provided by two direct broadcast satellite ("DBS") providers, DIRECTV, Inc. ("DIRECTV"), and DISH Network ("DISH").

2. The Massachusetts Department of Telecommunications and Cable ("MDTC") filed an opposition to the petition, to which Petitioner filed a reply. The Town of Adams, the Town of Clarksburg, and the City of North Adams ("Franchising Authorities") also filed an opposition to the

1 See 47 U.S.C. § 543(l)(1)(B).

2 47 C.F.R. § 76.905(b)(2).

3 The MDTC is the franchise authority for rate regulation of cable services throughout the Commonwealth of Massachusetts. Massachusetts Department of Telecommunications and Cable Opposition to Time Warner Cable Inc.'s Petition for Special Relief at 2 n.2 ("MDTC Opposition"). In its opposition, MDTC raises a procedural issue. MDTC challenges the effective filing date of Time Warner's petition because Time Warner failed to serve MDTC at its current business address. MDTC Opposition at 2-3. In response, Time Warner states that Section 1.47(g) of the Commission's rules allows service to be corrected unless doing so would result in material prejudice to a party. Time Warner Cable Inc. Reply to Opposition of Massachusetts Department of Telecommunications and Cable at 2 ("Reply to MDTC"). See also 47 C.F.R. § 1.47(g). As soon as MDTC informed Time Warner of the error, Time Warner mailed a corrected service copy of the petition to MDTC's current address. Reply to MDTC at 1-2, Exh. 1. Time Warner also points out that MDTC was able to timely file its opposition. Therefore, Time Warner argues the Commission should not amend the effective filing date of its petition because MDTC was not prejudiced in any way. Id. at 1-2. Finding no prejudice to the parties, we will consider the original filing date of the petition as the effective filing date.

4 Reply to MDTC.

petition,⁵ to which Petitioner filed a reply.⁶

3. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,⁷ as that term is defined by Section 623(l) of the Communications Act and Section 76.905 of the Commission's rules.⁸ The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area.⁹ For the reasons set forth below, we grant the petition in part based on our finding that Petitioner is subject to effective competition in the communities of Clarksburg and North Adams, but we deny the petition in part as to the community of Adams.

II. DISCUSSION

4. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if the franchise area is (a) served by at least two unaffiliated multichannel video programming distributors ("MVPDs"), each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds 15 percent of the households in the franchise area.¹⁰ This test is referred to as the "competing provider" test.

A. The First Prong of the Competing Provider Test

5. The first prong of this test has three elements: the franchise area must be "served by" at least two unaffiliated MVPDs who offer "comparable programming" to at least "50 percent" of the households in the franchise area.¹¹ It is undisputed that the Communities are "served by" both DBS providers, DIRECTV and DISH, and that these two MVPD providers are unaffiliated with Petitioner or with each other. A franchise area is considered "served by" an MVPD if that MVPD's service is both technically and actually available in the franchise area. DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in the franchise area are made reasonably aware of the service's availability.¹² The Commission has held that a party may use evidence of penetration rates in the franchise area (the second prong of the competing provider test discussed below) coupled with the ubiquity of DBS services to show that consumers are reasonably aware of the availability of DBS service.¹³ We further find that Petitioner has provided sufficient evidence to support its assertion that potential customers in the Communities are reasonably aware that they may purchase the service of these MVPD providers.¹⁴ Also undisputed is

⁵ Opposition of the City of North Adams, MA, Town of Adams, MA, and Town of Clarksburg, MA, to Time Warner Cable Inc.'s Petition for Special Relief ("Franchising Authorities Opposition"). The Franchising Authorities filed motions asking for extensions of time in which to file an opposition. Finding no prejudice to the parties, we will consider the pleading for purposes of having a complete record before us.

⁶ Time Warner Cable Inc. Reply to Opposition of the City of North Adams, MA, Town of Adams, MA, and Town of Clarksburg, MA, ("Reply to Franchising Authorities").

⁷ 47 C.F.R. § 76.906.

⁸ See 47 U.S.C. § 543(l)(1); 47 C.F.R. § 76.905(b).

⁹ See 47 C.F.R. §§ 76.906-76.907(b).

¹⁰ 47 U.S.C. § 543(l)(1)(B); 47 C.F.R. § 76.905(b)(2).

¹¹ 47 U.S.C. § 543(l)(1)(B)(i); 47 C.F.R. § 76.905(b)(2)(i).

¹² See Petition at 3-5.

¹³ *Mediacom Illinois LLC*, 21 FCC Rcd 1175, 1176, ¶ 3 (2006).

¹⁴ 47 C.F.R. § 76.905(e)(2).

Petitioner's assertion that both DIRECTV and DISH offer service to at least "50 percent" of the households in the Communities because of their national satellite footprint.¹⁵

a. Franchising Authorities' Objections

6. The "comparable programming" element is met if a competing MVPD provider offers at least 12 channels of video programming, including at least one channel of nonbroadcast service programming.¹⁶ The Franchising Authorities argue that neither DBS provider offers comparable programming, and specifically, that neither DBS provider offers public, educational and government ("PEG") access programming.¹⁷ The Franchising Authorities assert that the channels offered by the DBS providers do not cover local news and events in the Communities, unlike, for example, PEG access programming available to cable subscribers from Northern Berkshire Community Television.¹⁸ Additionally, the DBS providers only offer programming from one of the nearby over-the-air broadcast markets (*i.e.* Boston, Albany or Hartford), although residents in the Communities are interested in programming from more than one market.¹⁹ The Franchising Authorities also point out that given the geographic isolation of the Communities, residents have limited ability to receive over-the-air signals and are more reliant on basic cable service.²⁰ For these reasons, the Franchising Authorities argue the DBS providers do not offer comparable programming, and therefore, Petitioner has failed to satisfy the first prong of the competing provider test.

b. Time Warner's Reply

7. In reply, Petitioner argues that the comparable programming element is met if a competing MVPD provider offers at least 12 channels of video programming, including at least one channel of nonbroadcast service programming, and does not depend on the availability of PEG access programming.²¹ Therefore, Petitioner concludes the DBS Providers do offer comparable programming, which is supported in the petition with citations to the channel lineups for both DIRECTV and DISH.²²

c. Conclusion

8. Contrary to the assertions made by the Franchising Authorities, we find that Petitioner has submitted sufficient evidence demonstrating that the DBS providers provide comparable programming. We have repeatedly held that determining whether competing service is comparable for effective competition purposes does not depend on whether the competing service includes PEG access programming.²³ The channel lineup for the DBS providers cited by Petitioner establishes that the DBS

¹⁵ See Petition at 6.

¹⁶ See 47 C.F.R. § 76.905(g); see also Petition at 5.

¹⁷ Franchising Authorities Opposition at 4-5.

¹⁸ *Id.* at 5, Appx. A.

¹⁹ *Id.* at 6.

²⁰ *Id.* at 6, 8-9.

²¹ Reply to Franchising Authorities at 4.

²² See *id.* at 4; Petition at 5-6, citing www.directv.com and www.dishnetwork.com.

²³ *Comcast Cable Commc'ns, LLC*, 28 FCC Rcd 15785, 15787, ¶ 7 (2013); see also *Comcast Cable Commc'ns, LLC*, 26 FCC Rcd 3993, 3994-95, ¶ 5 (2011) ("The rule does not mention PEG channels, and we have repeatedly held that the absence of PEG channels from competing service does not disqualify its programming from being 'comparable' to cable operators' for purposes of determining effective completion."); *CoxCom, Inc.*, 14 FCC Rcd 7134, 7141-42, ¶ 19 (1999) ("PEG programming is not one of the factors the Commission has indicated is germane

(continued....)

providers' services offer far more channels than our rule requires.²⁴ Therefore, the DBS providers' programming satisfies all the criteria stated in our rule's definition. Accordingly, we find that the first part of the competing provider test is satisfied for the Attachment A Communities.

B. The Second Prong of the Competing Provider Test

9. The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceeds 15 percent of the households in a franchise area. Petitioner asserts that it is the largest MVPD in the Communities.²⁵ We see no reason to doubt Petitioner's assertion, and so we accept it. The second prong of the competing provider test thus requires Petitioner to calculate DBS subscribership. The numerator of this statutory ratio is the number of DBS subscribers in each Community and the denominator is the number of households there.

a. Time Warner's Evidence

10. Petitioner first obtained from Media Business Corp. a list of zip codes that corresponds with the political boundaries of the Communities. Media Business Corp's process uses mapping software to identify all nine digit zip codes (zip code + four) that lie within the Communities.²⁶ Petitioner then gave the list of zip codes to the Satellite Broadcasting and Communications Association ("SBCA"), which reported to Petitioner the number of DBS subscribers in each zip code + four exchange.²⁷ To determine whether the competing provider penetration exceeds 15 percent of the households in a franchise area, Petitioner compared the DBS subscribership to the 2010 U.S. Census household numbers for each of the Communities. Petitioner asserts that the resulting ratios show that the number of households subscribing to MVPDs, other than the largest MVPD, exceeds 15 percent of the households for each of the Communities.²⁸

b. MDTC and Franchising Authorities' Objections

11. MDTC objects to Petitioner's DBS subscribership numbers. Specifically, MDTC asserts that SBCA likely included in its reports DBS subscribers living in seasonal homes, vacation homes, temporary homes, and multiple dwelling units such as college dormitories and nursing homes.²⁹ Relying on the 2010 U.S. Census, MDTC states there are 34 seasonal homes in Adams, 9 in Clarksburg, and 71 in North Adams.³⁰ MDTC argues that none of these housing units qualify as households.³¹ MDTC also states that Petitioner likely included these DBS subscribership numbers in its numerators, but did not include those subscribers' housing units in its denominators. As a result, MDTC argues these

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in determining whether comparable programming is being offered by a competitor."), *reconsideration granted on other grounds*, 15 FCC Rcd 728 (2000).

²⁴ Petition at 5, citing www.directv.com and www.dishnetwork.com.

²⁵ See Petition at 7.

²⁶ *Id.* at 7, Exh. A. A zip code + four analysis allocates DBS subscribers to a franchise area using zip code + four information that generally reflects franchise area boundaries in a more accurate fashion than standard five digit zip code information.

²⁷ *Id.* at 7.

²⁸ *Id.*

²⁹ MDTC Opposition at 5-6.

³⁰ *Id.* at 6 n.26, Exh. 1.

³¹ *Id.* at 6.

calculations inflate the DBS provider penetration rates in the Communities.³² MDTC also notes that even a minor reporting error could have a material impact on the presence of effective competition, particularly because the competing provider penetration rates are close to the 15 percent threshold.³³ MDTC asserts that the Commission should closely evaluate Petitioner's calculations. The Franchising Authorities agree with MDTC's arguments that these calculations inflate the DBS provider penetration rates in the Communities.³⁴ Therefore, MDTC and the Franchising Authorities urge the Commission to deny the Petition.³⁵

c. Time Warner's Reply

12. In reply, Petitioner argues that MDTC and the Franchising Authorities fail to provide any community-specific evidence to overcome its prima facie showing of effective competition.³⁶ Petitioner argues that MDTC and the Franchising Authorities' objections to SBCA's subscribership numbers are purely speculative. Petitioner notes that without presenting any substantive evidence, such as more reliable household data, MDTC and the Franchising Authorities fail to overcome Petitioner's initial evidentiary showing that the DBS penetration rates exceed 15 percent of the households for each of the Communities.³⁷ Petitioner points out that for more than 15 years, the Commission has accepted SBCA's DBS subscribership numbers in effective competition proceedings and has rejected speculative attacks on such data.³⁸

d. Conclusion

13. Effective competition decisions are made based on "households,"³⁹ which are occupied full-time housing units.⁴⁰ This excludes unoccupied housing units, college and university dormitories,⁴¹ seasonal and vacation homes,⁴² and nursing homes and similar assisted living facilities.⁴³ Concerning seasonal homes, because the 2010 U.S. Census household numbers exclude seasonal, recreational, or

³² *Id.* at 6. MDTC acknowledges that it is unlikely that all the seasonal homes in the Communities are DBS subscribers. *Id.* at 6 n.26.

³³ *Id.* at 6.

³⁴ Franchising Authorities Opposition at 2-3.

³⁵ MDTC Opposition at 4, 7; Franchising Authorities Opposition at 2-4.

³⁶ Reply to MDTC at 3-4; Reply to Franchising Authorities at 2-3.

³⁷ *Id.*

³⁸ *Id.*

³⁹ 47 U.S.C. 543(l)(1)(B); *see also* 47 C.F.R. 76.905(b)(2).

⁴⁰ *Comcast Cable Commc'ns, LLC*, 23 FCC Rcd 8564, 8567, ¶ 10 (2008); *Bright House Networks, LLC*, 22 FCC Rcd 4161, 4165, ¶ 11 (2007); *MCC Iowa LLC*, 20 FCC Rcd 15267, 15270, ¶ 7 (2005); *Mediacom Minnesota LLC*, 18 FCC Rcd 12768, 12770-71 ¶ 8 (2003); *Implementation of Sections of the Cable Television Consumer Protection & Competition Act of 1992: Rate Regulation: Buy-Through Prohibition*, MM Docket 92-266, Third Order on Reconsideration, 9 FCC Rcd 4316, 4324, ¶ 17 (1994); U.S. Census Bureau, *State & County QuickFacts* ("A household includes all the persons who occupy a housing unit as their usual place of residence") http://quickfacts.census.gov/qfd/meta/long_HSD410212.htm (visited Feb. 3, 2015).

⁴¹ *Charter Commc'ns Entm't I LLC*, 26 FCC Rcd 5975, 5980-81 ¶¶ 18-19 (2011); *Marcus Cable Assocs.*, 25 FCC Rcd 4369, 4372, ¶ 9 (2010); *CoxCom, Inc.*, 22 FCC Rcd 4533, 4538, ¶ 13 (2007).

⁴² *See* 47 C.F.R. § 76.905(c) ("households" shall not include those dwellings that are used solely for seasonal, occasional, or recreational use").

⁴³ *Charter Commc'ns Entm't I LLC*, 26 FCC Rcd at 5981, ¶ 19; *CoxCom, Inc.*, 22 FCC Rcd at 4538, ¶ 13.

occasional use housing, we believe that the number of DBS households reported by SBCA may be inflated by seasonal DBS households and so skew the ultimate percentage.⁴⁴ MDTC and the Franchising Authorities submitted evidence from the 2010 U.S. Census reporting 34 seasonal, recreational, or occasional use homes in the community of Adams, 9 in Clarksburg, and 71 in North Adams.⁴⁵ Where franchise authorities have submitted credible numbers of seasonal homes and the like, we have subtracted them from cable operators' DBS subscriber numbers.⁴⁶ Accepting the numbers submitted by MDTC and the Franchising Authorities, we find that a proportionate reduction in SBCA's DBS figures for the percentage of seasonal properties in the communities of Clarksburg and North Adams does not cause the overall DBS penetration rates to fall below 15 percent.⁴⁷ However, in the community of Adams, we find that this reduction does cause the overall DBS penetration rate to fall below 15 percent. In the community of Adams, 34 seasonal units represent approximately 0.87 percent (or 0.0087) of the total households (3,907). A 0.87 percent reduction of the allocated DBS subscribers (587) for Adams results in a DBS penetration rate of approximately 14.90 percent.⁴⁸ Accordingly, we find MDTC and the Franchising Authorities have presented specific data to rebut the initial evidentiary showing made by Petitioner. Therefore, we conclude that the second part of the competing provider test is not satisfied and Petitioner is not subject to effective competition in the community of Adams.

14. Despite the objections of MDTC and the Franchising Authorities, the second prong of the competing provider test is satisfied for the communities of Clarksburg and North Adams. It requires that Petitioner show that the competing providers' market shares exceed 15 percent in each Community, and Petitioner has made that showing. Therefore, based upon the aggregate DBS subscriber penetration levels that were calculated using Census 2010 household data,⁴⁹ as reflected in Attachment A, we find that Petitioner has demonstrated that the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in the communities of Clarksburg and North Adams. Based on the foregoing, we conclude that Petitioner has

⁴⁴ Concerning college dormitories, nursing homes, and similar group housing, MDTC has not presented any specific data to rebut Petitioner's evidentiary showing. See MDTC Opposition at 6 n.24. Therefore, we reject MDTC's contentions concerning multiple dwelling units.

⁴⁵ MDTC Opposition at Exh. 1; Franchising Authorities Opposition at Appx. B.

⁴⁶ See *Charter Commc'ns*, 25 FCC Rcd 2289, 2294, ¶ 15 (2010); *Bright House Networks, LLC*, 22 FCC Rcd 3499, 3502, ¶ 7 (2007); *Comcast Cable Commc'ns, LLC*, 22 FCC Rcd 1691, 1697-98, ¶ 16 and n.61 (2007), *reconsideration granted on other grounds*, 22 FCC Rcd 5320 (2007). Cf. *Charter Commc'ns*, 28 FCC Rcd 13989, 13993, ¶ 13 (2013) (The Commission declined to subtract seasonal homes from cable operator's DBS subscriber numbers because the franchise authority did not provide numbers of seasonal homes or other non-household dwellings in the communities to rebut the factual evidence presented by the cable operator); see also *Charter Commc'ns Entm't I, LLC*, 26 FCC Rcd at 5980-81, ¶¶ 17-19; *Time Warner Entm't-Advance/Newhouse P'ship*, 26 FCC Rcd 3829, 3835-36, ¶ 22 (2011) (decisions in which the Commission has refused to adjust household numbers to account for seasonal homes and the like).

⁴⁷ In Clarksburg, 9 units represent approximately 1.33 percent of the total housing units (675). A 1.33 percent reduction of the allocated DBS subscribers (120) for Clarksburg results in a DBS penetration rate of approximately 17.48 percent. In North Adams, 71 units represent approximately 1.21 percent of the total housing units (5,868). A 1.21 percent reduction of the allocated DBS subscribers (905) for North Adams results in a DBS penetration rate of approximately 15.24 percent. Accepting all these numbers, the communities of Clarksburg and North Adams would still have a penetration rate in excess of 15 percent. See, e.g., *Charter Commc'ns*, 28 FCC Rcd 15795, 15799 ¶ 10 n.38 (2013); *Comcast Cable Commc'ns, LLC*, 22 FCC Rcd at 1698, ¶ 16 n.61 (applying similar formula to determine proportionate reduction in SBCA's DBS figures for percentage of seasonal, recreational, or occasional use properties).

⁴⁸ Likewise, MDTC argues that if the denominator includes as few as 7 omitted seasonal households, the DBS penetration rate would fall below 15 percent ($587/3,914 = 0.14997$). MDTC Opposition at 6 n.26.

⁴⁹ Petition at 7, Exh. B.

submitted sufficient evidence demonstrating that both prongs of the competing provider test are satisfied and Petitioner is subject to effective competition in the communities of Clarksburg and North Adams.

III. ORDERING CLAUSES

15. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed in the captioned proceeding by Time Warner Cable Inc. **IS GRANTED** for the Communities of Clarksburg and North Adams and **IS DENIED** for the Community of Adams.

16. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates granted to the Communities of Clarksburg and North Adams **IS REVOKED**.

17. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.⁵⁰

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broecker
Senior Deputy Chief, Policy Division, Media Bureau

⁵⁰ 47 C.F.R. § 0.283.

ATTACHMENT A

MB Docket No. 13-92, CSR 8778-E

COMMUNITIES SERVED BY TIME WARNER CABLE INC.

Communities	CUID	CPR*	2010 Census Households	Estimated DBS Subscribers**
Town of Adams	MA0001	14.90%	3,907	582
Town of Clarksburg	MA0003	17.48%	675	118
City of North Adams	MA0004	15.24%	5,868	894

*CPR = Percent of competitive DBS penetration rate.

**Estimated DBS subscribers have been proportionately reduced to account for the percentage of seasonal properties in each community.